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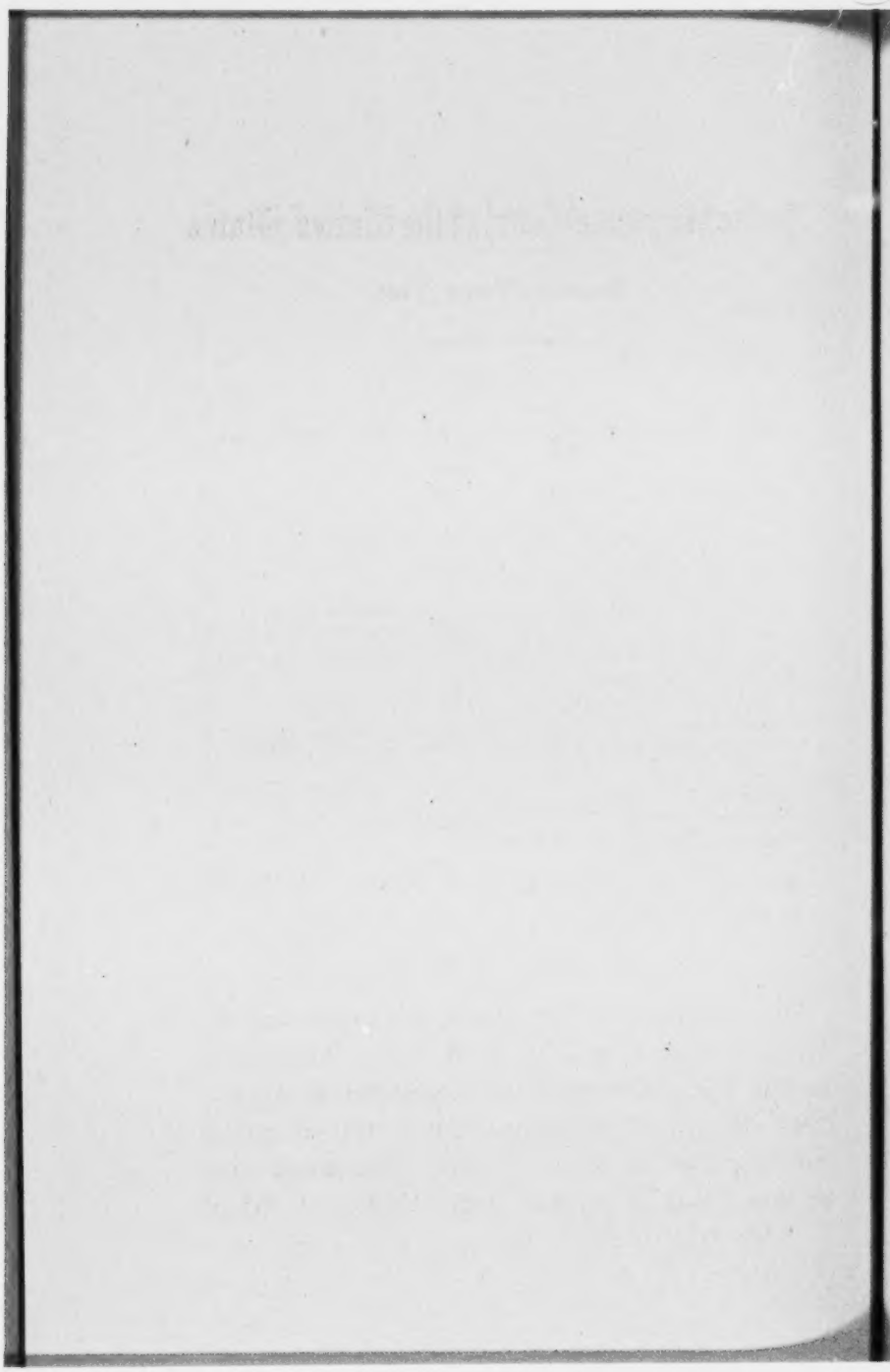

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 237

ROSS ENGINEERING COMPANY, INCORPORATED,
PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 29–33) is not yet reported.

JURISDICTION

The judgment of the Court of Claims was entered on February 5, 1945 (R. 33). Petitioner's motion for a new trial was overruled on May 7, 1945 (R. 33). The petition for a writ of certiorari was filed on July 17, 1945. The jurisdiction of this Court is invoked under Section 3 (b) of

the Act of February 13, 1925, as amended by the Act of May 22, 1939.

QUESTION PRESENTED

Whether, by virtue of a contract provision whereby the United States undertook to deliver completed foundation structures by specified dates, a contractor can recover from the United States its increased cost of performing concrete work in winter when, at the time of entering the construction contract, both the contractor and the Government knew, and acted on the basis of that knowledge, that such foundation work would not be completed until dates later than those specified, thus necessitating winter concrete work.

STATEMENT

On August 15, 1938, the United States issued an invitation for bids in connection with the proposed construction of a barracks at Fort Niagara, New York (R. 20). Since the Government proposed to clear the site and construct foundations itself by utilizing W. P. A. labor, the invitation for bids on the construction of the building specified, *inter alia,* that the foundations of the three wings of the building would be completed on September 5, September 20, and September 30, 1938, respectively (R. 20).

Petitioner, a building contractor with its principal office in Washington, D. C. (R. 19–20), prepared a bid in connection with the invitation of August 15, 1938 (R. 21). Initially, petitioner

contemplated a continuous operation in the pouring of concrete by scheduling operations on the various building wings as each foundation was completed, thus avoiding winter work (R. 21). However, petitioner did not insert a figure into its prepared bid but sent its engineer to Fort Niagara (the designated place for the submission and opening of bids) for the purpose of there filling in the amount (R. 21).[1] This engineer, who was also sent to examine the site, learned that the foundations could not be completed by the dates specified in the invitation (R. 21–22). The engineer, on August 30, 1938, telephoned petitioner and informed it that the foundations would not be ready for two, three or four months thereafter (R. 22). The money figure to insert in the bid was thereupon furnished by petitioner to the engineer who completed and submitted the bid (R. 21–22).

Petitioner's bid was the lowest by a small amount but its provisions as to time for completion of the project and time within which to commence work were not the most favorable to the Government, nor was the time within which the bid was to remain open for acceptance as long as that set in another bid (R. 22). The engineer

[1] Petitioner's implication (Pet. 3) that the hope of avoiding winter work was the basis used in calculating the money figure inserted in its bid is unsupported by the court's findings (R. 21–22).

again telephoned the petitioner and informed it of these facts (R. 22).[2] On September 1, 1938, prior to the acceptance of its bid, petitioner reduced the time set in its bid for performance from 550 days to 300 days (R. 22–23). Petitioner's modified bid was accepted on September 3, 1938, and a formal contract was executed as of that date (R. 23). The formal contract embodied by reference portions of the invitation, including that portion which established September dates for the completion of the various foundations (R. 5).

Acting on its knowledge that the foundations would not be ready on the dates specified in the written contract, petitioner did not enter the subcontract for concrete work until September 18, 1938 (R. 24). Utilizing the same knowledge in negotiating this subcontract, petitioner was able to obtain a substantial reduction in the subcontractor's asking price because of economies the subcontractor could thus effect in the use of form lumber (R. 24).

The north wing foundation was completed on September 20, 1938, the bay foundation on October 15, 1938, and the south wing foundation on November 4, 1938 (R. 24, 25), these completion dates being earlier than those anticipated by petitioner at the time of submission of its bid (R.

[2] Either in this telephone conversation or in the earlier one, the engineer informed his Washington office that the foundation work was being retarded by reason of the discovery of an underground spring and the limited hours of work allowed in the use of W. P. A. labor (R. 22).

22). The subcontractor proceeded with the concrete work as each of the wing foundations was completed (R. 24–25), with certain minor delays caused by himself, until, after a dispute with petitioner, he abandoned the work on December 15, 1938 (R. 24, 25–26). On that date, the first floor and a small portion of the second floor concrete work had been completed (R. 26). Petitioner completed the concrete work itself (R. 26). On and after December 16, 1938, cold weather required petitioner to enrich the concrete mixture, to purchase tarpaulins to cover the concrete, and to use heat devices to prevent freezing; icy roads also caused some loss of time in the work, which was, however, completed within the contract period as extended by the United States (R. 26). The extension was based on a request therefor made by petitioner on December 16, 1938, in which attention was called to the completion of the foundations at times later than those specified in the original invitation (R. 26–27) [3] and to the decrease from 550 to 300 days in the time specified for completion of the work (R. 27). A thirty-

[3] As noted by the court below, the letter in which petitioner requested this extension contained the "untrue statement" that petitioner had discovered that the foundations were not ready "upon receiving notice to proceed" (R. 32). The court found, as set forth above, that petitioner, prior to the submission of its bid, knew that the foundations would not be completed by the September dates specified in the "invitation" In fact, the foundations were completed sooner than anticipated by petitioner.

five day extension was requested by and granted to petitioner as a "suitable adjustment" (R. 27–28).[4]

A final invoice was submitted by petitioner on or about September 1, 1939, and, by check dated September 16, 1939, petitioner was paid the contract price plus certain extras (R. 26).

The petitioner thereafter brought suit, alleging that the completion of the foundation work by the United States at dates later than those specified in the written contract constituted a breach of contract which entitled it to recover the increased cost of performing winter concrete work. The court below found the facts as set forth above and stated that, since petitioner had knowledge of the actual progress of the foundation work prior to the time of submission of its bid and had "made all * * * arrangements accordingly" (R. 30), petitioner could not have been misled to its damage (R. 31). The court further stated that there was no justification for ignoring petitioner's knowledge of these facts in order to hold that the United States had warranted the completion of the foundation work on the dates originally specified (R. 31). The

[4] The contract (No. W 6491 qm–4, O. I. No. 2) contained the usual provision for liquidated damages, the rate being $50 per calendar day of delay in completion of the work (R. 10, 24).

court noted that petitioner's position as low bidder depended on so slight a margin as to be jeopardized by any change petitioner might have made in its bid (R. 32). It held that the foundation completion dates contained in the written specifications were outside the contemplation of the contract; that neither party, at the time of contracting, intended that the foundations would be completed on the original dates; and that their later completion was therefore no breach of contract (R. 32–33). Accordingly, it dismissed the petition (R. 33).

ARGUMENT

1. The facts found by the court below, binding upon petitioner (cf. *United States* v. *Esnault-Pelterie,* 299 U. S. 201, 205–206), clearly established that both petitioner and the United States understood that the foundation work was not to be completed on the dates specified in the original invitation (R. 33). Based on this understanding, the real bargain between the parties was properly enforced and necessarily defeated petitioner's technical argument from the written provisions of the contract.[5] *Ackerlind* v. *United States,* 240 U. S. 531, 534; *E. W. Bliss Co.* v. *United States,*

[5] No question as to distinctions between impossibility and improbability of performance is presented by this case and authorities cited by petitioner which rest upon the distinction are inapposite (Pet. 7–12).

275 U. S. 509; *Poole Engineering & Machine Co.* v. *United States,* 58 C. Cls. 9, 19–20.

The court below had jurisdiction to grant, in effect, reformation of the written contract (*United States* v. *Milliken Imprinting Co.,* 202 U. S. 168, 173–174), and petitioner's conduct in failing to call the Government's error to its attention was such that reformation was properly granted. *Restatement of Contracts,* Sections 504, 505; Williston, *Contracts* (Rev. Ed.) Section 1548. Reformation may be had to "express the actual agreement of the parties, in case of mutual mistake, or mistake upon the part of one and fraud or inequitable conduct on the part of the other." *Columbian Nat. Life Ins. Co.* v. *Black,* 35 F. 2d 571, 573 (C. C. A. 10).

Petitioner knew that the foundations would not be ready on the dates specified in the original invitation and used its advantage in every aspect of the transaction. It ignored its actual knowledge for the purpose of maintaining the low bidder position. It utilized that knowledge in making the arrangements for sub-contracting work. It relied upon the written specifications in obtaining an extension of time. Certainly petitioner could not equitably utilize this knowledge to its advantage in all these ways and at the same time secure damages for breach of contract.

Completely disregarding these facts, petitioner here insists that the question is simply one of holding the United States bound by a written provision of the contract (Pet. 2, 7, 9). Thus, petitioner states that it had a "perfect legal right" to rely upon the written provision (Pet. 15) and that the failure of the Government to notify petitioner that the foundation work would not be complete on the dates set forth in the invitation prevented petitioner from refusing to enter the contract as it would "unquestionably" have done (Pet. 15). The basic point in the case lies in the findings below that petitioner had knowledge of the facts and that, by virtue of this knowledge, petitioner did not have a "perfect legal right" to remain silent and thereafter utilize the written provision to its own advantage. With equal strength, the findings as to petitioner's knowledge refute any contention that petitioner lost the opportunity of refusing to contract.[6] Petitioner inserted the contract price into its bid after learning the actual situation as to the completion of the

[6] The petition is itself inconsistent in connection with this question of reliance. Petitioner contends that there is no question of misrepresentation or warranty (Pet. 12–13), a contention which is contradicted by its subsequent assertion that it lost the opportunity of withdrawing from the contract by reason of the Government's failure to disclose to it that the foundations would not be complete on the dates originally specified (Pet. 15).

foundation. In the absence of a showing that, despite its knowledge, petitioner did not take this changed situation into account in making its bid (R. 21) and planned to rely on the contract as written, no finding of money damage could be sustained. This in itself would justify the dismissal of the claim. *United States* v. *Smith*, 94 U. S. 214, 218–219; *United States* v. *Wyckoff Pipe & Creosoting Company, Inc.*, 271 U. S. 263, 267.[7]

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[7] It is to be observed that another bar to petitioner's recovery exists, not fully disclosed, in the record. The court below found that petitioner was, by check dated September 16, 1939, paid the contract price, plus extras, "the final invoice having been submitted on or about September 1, 1939" (R. 26). The final voucher was received in evidence, and, while the court below did not make specific findings in respect thereof, that voucher shows on its face that petitioner failed to reserve the claim here involved. Failure to assert an alleged breach of contract by the Government at the time of final settlement is, in itself, sufficient to defeat the claim. *Poole Engineering & Machine Co.* v. *United States*, 57 C. Cls. 232, 234. While the record does not include the final voucher, it is assumed that its contents would not be denied by petitioner. Accordingly, even should certiorari be granted and the judgment below reversed, the case would have to be remanded to the Court of Claims for a specific finding in this respect, a finding which would result in dismissal of petitioner's claim. Cf. *United States* v. *Brooks-Callaway Co.*, 318 U. S. 120, 124–125.

CONCLUSION

The decision below turns on the particular facts of this case. No question of importance is presented and there is no conflict. It is, therefore, respectfully submitted that the petition for a writ of certiorari should be denied.

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